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Nos. 97-829, 97-1075, 97-1087, 97-1099, 97-1141

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

AND RELATED CASES

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER AND CROSS-RESPONDENT MCI TELECOMMUNICATIONS CORPORATION'S REPLY AND RESPONSE

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INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents and cross-petitioners impermissibly ask this Court to recreate national telecommunications policy *de novo.* Avoiding any serious analysis of the statutory text and ignoring the compelling factual and policy findings of the Federal Communications Commission ("FCC"), the incumbent local carriers (joined by the state commissions only on the jurisdictional issue) demand a series of judicially imposed restrictions that appear nowhere in the Telecommunications Act of 1996 (the "1996 Act" or "Act"), and serve only to protect their entrenched interests. It is hardly surprising that the incumbent carriers would seek to derail efforts to end their longstanding monopolies, or that state utility commissions would be unhappy about Congress' decision to limit their prior authority to prescribe the substantive law governing competition in intrastate markets. But this case is not about whether Congress or the FCC made the best policy choices. The issue here is whether Congress foreclosed the FCC from implementing the 1996 Act in the way that the FCC has. *See Regions Hosp. v. Shalala,* 118 S. Ct. 909, 915-16 (1998). On that question, respondents and cross-petitioners are virtually silent.

The incumbent carriers' attempt to replace the statutory text and the FCC's expert policy judgments with their own policy preferences is most transparent in their attacks on the FCC rules implementing § 251(c)(3), the provision requiring incumbents to lease unbundled elements of the local network. Those attacks rest on the premise that entry into local markets through the use of unbundled elements should be discouraged because such entry would threaten the existing scheme of implicit universal service subsidies and create disincentives to pure facilities-based competition. For these reasons, the incumbents demand four specific restrictions: (i) no leasing of existing combinations of network elements; (ii) no leasing of *any* network elements unless a new entrant already has facilities of its own; (iii) no leasing of critical features, functions and capabilities of the network; and

(iv) no leasing of network elements that are theoretically "available" from a source other than the incumbent.

The Act, however, does not suggest, much less impose, the restrictions the incumbents demand. Had Congress wanted to impose them, it could easily have done so in plain English. There is no reason to think that Congress wanted to preserve the status quo of monopoly service and implicit subsidies until some distant future time when (or if) competing ubiquitous physical networks have been built. To the contrary, Congress wanted to ignite competition as "quickly as possible,"[1] and (as even the incumbents' own lawyers have acknowledged) legislated an end to the insupportable scheme of hidden subsidies that was the sole remaining justification for shielding the incumbent carriers from competition. *See* P. Huber, M. Kellogg & J. Thorne, *The Telecommunications Act of 1996*, at 55 (1996) (praising the Act's "long overdue" reform of "the universal service guarantee [that] has evolved into a rat's nest of implicit subsidies and accounting sleight-of-hands utterly unsuited to a competitive marketplace"). Nor did Congress view the prospect of the immediate reduction of implicit subsidies as a threat requiring remedial statutory impediments. Instead, in § 254 of the Act, Congress mandated explicit, competitively neutral regulatory mechanisms that would fund universal service in ways that did not impede the rapid emergence of competition. Thus, there is simply no basis for concluding that Congress foreclosed the FCC from implementing the 1996 Act's unbundling requirements in a manner that would jumpstart local competition.

Respondents' efforts to deny the FCC any authority to implement the Act's pricing requirements are likewise an attempt to rewrite the statutory text in the service of policy preferences that Congress nowhere articulated. The statutory text unambiguously gives the FCC authority to implement all requirements of the 1996 Act. Section

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1 H.R. Rep. No. 104-204 at 89 (1995) ("H. Rep.").

251(d)(1) of the 1996 Act authorizes the FCC to implement the requirements of § 251, including the substantive requirement that rates be "just, reasonable, and nondiscriminatory." Section 201(b) of the Communications Act grants the FCC authority to implement all provisions of the Act—including §§ 251 and 252. Thus, the FCC would lack authority to issue pricing regulations only if other statutory language clearly restricted these plenary grants of authority. None does.

Respondents' arguments ultimately rest on the incorrect theory that the 1996 Congress wanted to maintain the division of regulatory authority previously established by the 1934 Communications Act. That argument ignores reality. The 1996 Act dramatically changed the prior regulatory regime in which federal law governed interstate matters and state law governed intrastate matters. Congress expressly preempted state laws that restricted competitive entry into local markets (§ 253), and supplanted state laws governing intrastate carrier-to-carrier relations with federal requirements designed to foster local competition (§§ 251(c) and 252(d))—including, specifically, requirements governing the prices incumbents could charge new entrants for use of the existing network. Congress made clear that the FCC, in "implementing and enforcing" these new substantive requirements, could preempt state laws that were inconsistent with them or that hindered achievement of their purposes. § 251(d)(3). Congress also denied state courts any power to review state commission decisions under § 252 of the Act, and mandated federal court review of those decisions. § 252(e)(4), (6). Thus, it is simply not plausible to argue that the FCC was guilty of "breaching a 60-year old statutory barrier that Congress had purposely left in place" when it passed the 1996 Act. Brief of Bell Atlantic Corporation, et al. (hereinafter "BA") at 2. Congress—not the FCC—breached that barrier.

Respondents' reliance on § 2(b) of the 1934 Act does not advance their case. The issue here is quite different than the one they pose; it involves the respective roles of

the FCC and state utility commissions in implementing *federal* law. In particular, the issue is whether as a result of § 2(b), after Congress has already prescribed law governing intrastate matters and granted the FCC general implementing authority, Congress must go further and specify expressly that the FCC's rulemaking authority extends to all of the particular intrastate matters indisputably governed by federal substantive law. Section 2(b) does not impose such a requirement. Instead, the requirements of § 2(b) are met when Congress indicates its intent in a "straightforward" and "unambiguous" manner. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 377 (1986). There is no basis for respondents' attempts to read § 2(b) as imposing an additional rule that Congress make its intent "express." Just as Congress made clear (though not express) that the local competition provisions *apply* to intrastate matters, Congress plainly intended the FCC to have jurisdiction to implement those provisions. Moreover, in *Louisiana*, the Court relied on § 2(b) to deny the FCC the authority to exercise *ancillary* jurisdiction to regulate beyond where Congress had legislated. The case does not hold that even where Congress has enacted federal requirements to govern intrastate matters, the FCC lacks authority to implement those federal requirements absent an additional, and express, grant of specific authority to regulate.

ARGUMENT

I. THE INCUMBENTS' CHALLENGES TO THE FCC'S "UNBUNDLING" REGULATIONS ARE WITHOUT MERIT.

The incumbents devote most of their briefs to arguments designed to disable § 251(c)(3). The gist of their case is that the statutory language Congress employed in § 251(c)(3) (which sets forth the leasing obligation) and § 153(29) (which defines "network elements"), if given its ordinary meaning, would make it too easy for new entrants immediately to begin offering competitive service—and compete away monopoly profits—by leasing unbundled elements. They argue that Congress instead

intended to establish only two avenues to enter the local market—either undertaking the staggeringly expensive task of building a duplicative local network (which might bring about real competition in the distant future), or following the far easier route of reselling the incumbents' existing services (which does not threaten incumbents in any serious way). The right to lease unbundled elements was, in their view, merely a means by which new entrants could temporarily obtain discrete pieces to fill in gaps as they struggled through the long, slow process of building their own networks. The FCC's decision to give the text of § 251(c)(3) its ordinary meaning, thereby making leasing unbundled elements a robust entry strategy, the incumbents argue, was a grave error because it allowed for *real* competition—which would drive retail rates to cost—in the short term. According to the incumbents, the 1996 Act contemplates a much slower transition to competition, thus preserving for the indefinite future the current system of rate averages and implicit subsidies. Until new entrants have their own networks, the incumbents contend that they should be able to compete only by using the Act's resale option, which does not threaten the existing rate structure.

This central theme animates each of the incumbents' challenges to the FCC rules implementing § 251(c)(3). First, the incumbents defend the Eighth Circuit's invalidation of Rule 315(b) on the ground that new entrants must be made to bear the senseless and discriminatory cost of reconnecting the elements needlessly ripped apart by the incumbents, because otherwise leasing network elements might become an economically feasible means of competing away the incumbents' supracompetitive profits. Second, the incumbents attack the Eighth Circuit's affirmance of the FCC's decision that new entrants may lease network elements even if they do not yet have any of their own facilities, again arguing that new entrants will be able to erode too quickly the incumbents' monopoly profits. Third, the incumbents argue that the FCC made too much of the network avaliable for lease.

Finally, the incumbents assert that the FCC made it too easy for new entrants by allowing them to lease particular unbundled elements of the existing network even when those elements might be available (at a higher price) from another source. These particular complaints form the substance of incumbents' rhetorical claims that the FCC has authorized "sham unbundling" and read resale out of the Act.

Although the incumbents colorfully describe the FCC's rules as a "wrecking ball" demolishing carefully crafted statutory restrictions on the Act's leasing provisions, the truth is that the statutory text contains no such restrictions. That is critical, for (though the incumbents never mention it) the FCC's interpretation of § 251(c)(3) and § 153(29) is subject to judicial invalidation only if (i) Congress has spoken to "'the precise question at issue'" and foreclosed the agency's interpretation, or (ii) that interpretation is arbitrary and capricious or otherwise unreasonable. *Regions Hosp.*, 118 S. Ct. at 915 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)). In evaluating the FCC's unbundling rules, judicial deference is particularly warranted, both because Congress directly delegated to the FCC the task of implementing the Act's unbundling requirements, *see United States v. O'Hagan*, 117 S. Ct. 2199, 2217 (1997), and because these issues involve a "complex and highly technical regulatory program" and "necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quotation omitted). Indeed, deference should be at its zenith because (as will be shown) the incumbents' unbundling arguments ultimately rest on disagreements with the FCC's findings and predictive judgment about how market participants will behave. *See FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 813 (1978) (deference especially appropriate for findings "of a judgmental or predictive nature").

With respect to each of the incumbents' challenges to the FCC's unbundling rules, there is no plausible argument that the statutory text unambiguously forecloses the FCC's interpretation. Nor have the incumbents shown that the FCC's rules are arbitrary or capricious, or otherwise unreasonable. In the rulemaking process, the incumbents vigorously pressed their demands for delaying local competition, preserving implicit subsidies, and creating artificial incentives for competitors to construct competing networks by burdening other possible entry strategies. But the FCC chose to implement the Act's unbundling requirements so as to jumpstart local competition. The FCC did so only after making appropriately detailed findings that its rules would not "read resale out of the Act" or otherwise threaten the legitimate interests of the incumbents. The FCC was not insensitive to the incumbents' policy pleas. But it made clear that the preservation of universal service would be accomplished as Congress intended—through the explicit, competitively neutral mechanisms mandated by § 254 of the Act—and not by subverting the goal of immediate competition in local markets. The 1996 Act did not deny the FCC that policy choice, and reviewing courts are not in a position to second-guess it.

A. The Incumbents Have Not Demonstrated That the Text of § 251(c)(3) Unambiguously Forecloses the FCC's Decision to Impose Rule 315(b), Or That the Rule Is Arbitrary And Capricious Or Otherwise Unreasonable.

The incumbents make only a half-hearted effort to defend the Eighth Circuit's invalidation of Rule 315(b). They do not take issue with most of what was said in petitioners' opening briefs. They do not even mention (much less try to satisfy) the governing legal standard set forth in *Chevron*. Nor do they even acknowledge the FCC's detailed findings made in support of Rule 315(b).

The best the incumbents can do by way of textual analysis is to argue that the FCC's interpretation of § 251(c)(3) is not the only possible reading. More

specifically, they assert that the statutory term "unbundle" in the first sentence of § 251(c)(3) can mean "physically separated," and that "separately priced" is therefore not "the only reasonable" interpretation of the term. BA 54. That hardly suffices. Under *Chevron*, an agency has the discretion to adopt *any* reasonable interpretation of a term, and past agency usage and multiple dictionary definitions are powerful indications that the agency's construction is reasonable.[2]

To buttress their argument that "physically separated" is the better reading, the incumbents argue that the requirement in the second sentence of § 251(c)(3) that incumbents "shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements," must be read as authorizing the lease of individual elements *only* in a physically separated form. But that is not what the statute says. The incumbents read into § 251(c)(3) the qualifier "only," a word that does not appear in the text.[3] The FCC reasonably read the second sentence of § 251(c)(3) to mean that *when* a competitor wishes to combine elements on its own in order to reconfigure the elements, the incumbent must allow the competitor to do so. It does not follow that elements which are already combined must be ripped apart for no valid economic reason. The incumbents' different construction of § 251(c)(3) "is not an inevitable one," *Regions Hosp.*, 118 S. Ct. at

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[2] Elements that can be unbundled for use by a lessor at a separate price typically—though not inevitably—*can* be made available as physically separate items. It is therefore hardly surprising that the FCC on occasion has discussed the mechanics of separating elements that are to be unbundled.

[3] *See* BA 53 ("the 1996 Act says in no uncertain terms that incumbents need *only* provide 'access to network elements on an unbundled basis' and *only* in a 'manner that allows requesting cariers to combine such elements'") (emphasis added); GTE 66 (section 251(c)(3) "concludes by specifying that incumbents are required to provide elements *only* 'in a manner that allows requesting carriers to combine such elements'") (emphasis added).

916-17, and does not provide a basis for invalidating Rule 315(b).

Nor have the incumbents dealt with the conflict between their definition of "unbundled" and the nondiscrimination requirement of § 251(c)(3). The incumbents contend that it is not discriminatory to force new entrants to bear the cost of reconnecting elements the incumbent has ripped apart, because the incumbents did not "stumble[] on their networks already constructed and combined." U S West 52; *see also* BA 56. In other words, they argue that by being forced to put the network back together, a competitor is doing no more than what the incumbent had to do when it initially constructed the network. But that is to ignore the economies of scale that alone made it possible for the incumbents to construct their extensive networks—economies that the leasing provisions allow new entrants to share. In any event, as the incumbents know, when a competitor leases a network element, the cost of connecting that element to the rest of the telephone network has already been built into the lease price of that element.[4] As a result, when a competitor is forced to reconnect network elements the incumbent has ripped apart, it is paying twice, while the incumbent has paid only once (and has already been fully reimbursed for the competitor's share of that cost). Moreover, competitors' customers suffer a loss of service during the reconnection process, while the identically situated Bell Atlantic customer does not. That is the very definition of discrimination, prohibited by the plain terms of § 251(c)(3).

Because the text does not help them, the incumbents resort to the argument that the Court of Appeals' deci-

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[4] For example, as Bell Atlantic testified in Maryland at the proceeding through which element prices were set, included as part of the element price of the wire loop that connects the residence to the switch is a "central office termination cost," which represents the cost of connecting the loop to the switch at the central office. Testimony of E. Beard for Bell Atlantic-Maryland, Inc., MD PSC Case No. 8731-II at 5 (Jan. 10, 1997).

sion was appropriate because it "provides a bulwark against the total elimination of Congress' distinction between unbundled elements and resale." U S West 48; *see also* GTE 50. As we demonstrate below, however, there simply is no basis for the incumbents' predictions that the FCC's rules will eliminate the distinction between unbundled elements and resale. *See infra* pp. 14-16. In any event, that concern cannot possibly justify the Eighth Circuit's hopelessly overbroad "bulwark." Rule 315(b) applies to a competitor's request to lease *any* two elements in combination, not only to a request by a competitor with no facilities of its own to lease all of the network elements necessary to provide service, the so-called "platform" of elements the incumbents wrongly assert is the functional equivalent of resale. The invalidation of Rule 315(b) is thus a grossly overbroad response to the policy concern the incumbents have raised. Knocking out every existing combination of network elements merely to prevent new entrants from relying *entirely* on leased elements has enormously harmful marketplace consequences. MCI, for example, has invested nearly two billion dollars in local facilities, and had intended to offer its own new services through its own facilities and facilities leased in combination from the incumbents. The Eighth Circuit's invalidation of Rule 315(b) has dramatically inflated the cost of MCI's entry strategy, even though by no stretch of the imagination could that strategy be described as the functional equivalent of resale. In sum, it was hardly unreasonable for the FCC to reject the incumbents' policy-based arguments against Rule 315(b).

B. The Act Does Not Make Ownership of Facilities a Prerequisite to Leasing Unbundled Elements.

The incumbents' attack on the FCC's refusal to read a facilities-ownership requirement into § 251(c)(3) suffers from the same flaws as their arguments against Rule 315(b): the statutory text does not unambiguously foreclose the FCC's reading, and it was reasonable for the FCC to reject the incumbents' policy arguments. Indeed, incumbents' pejorative assault on what they call

"sham unbundling," and their arguments that the FCC's rule will "read resale out of the Act"—and thereby threaten their cherished subsidies—amount to nothing more than a disagreement with the predictive judgments of the expert agency. But the FCC made detailed findings supporting its approach, and the incumbents have advanced nothing but *ipse dixit* in response.

1. *The Eighth Circuit Correctly Concluded That the FCC's Interpretation Is Not Unambiguously Foreclosed by the Statutory Text.*

The incumbents have not shown that the text of § 251 (c)(3), either standing alone or in context, "has directly spoken to the precise question at issue" and unambiguously foreclosed the FCC's interpretation. *See Chevron,* 467 U.S. at 842-43. In upholding the FCC, the Eighth Circuit relied upon the "plain language" of § 251(c)(3), which expressly imposes on incumbents "[t]he duty to provide, to *any* requesting telecommunications carrier . . . nondiscriminatory access to network elements on an unbundled basis at any technically feasible point." § 251 (c)(3) (emphasis added); *see also* Pet. App. 55a. Indeed, the Eighth Circuit agreed with the FCC that a "facilities ownership" requirement is *foreclosed* by that plain language, which "is cast exclusively in terms of obligations imposed on incumbent LECs, and . . . does not discuss, reference, or suggest a limitation or requirement in connection with the right of new entrants to obtain access to unbundled elements." *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 15499 at ¶ 294 (1996), Pet. App. 242a (*"Local Competition Order"*).

The incumbents never address the FCC's reading of "any telecommunications carrier." Instead they rely on entirely different statutory language, which requires incumbents to provide access to "network elements . . . at any technically feasible point." § 251(c)(3). This language, they assert, shows that Congress contemplated that competitors would have their own facilities to con-

nect with leased facilities. But this is not an argument based on what the text says; it is an argument based on what the incumbents claim the text presupposes. Had Congress wanted to restrict leasing to carriers who owned facilities, it surely would have imposed the intended restriction directly—as it did in the immediately preceding section of the Act. *See* § 251(c)(2) (imposing a duty to provide interconnection only for carriers that own or lease facilities).

In any event, the text does not support incumbents. The statute merely imposes a duty on incumbents to make their network elements available in a way that enables competitors to interconnect with them if that is what competitors want. Elements provided under § 251(c)(3) will, of course, be used by new entrants that do have their own facilities; the statutory language on which the incumbents rely assures that these new entrants will be able to interconnect their elements with those they lease. And, it is equally true that a new entrant relying exclusively on leased elements would require a technically feasible point of interconnection with the incumbent's operational support systems—the computers and databases that run the local network. Otherwise it would be unable to order the elements, bill for them, and connect the leased elements to long-distance networks. Thus, the inference upon which the incumbents rely is untenable.

Nor are the incumbents correct that the broader "context" of § 251 compels the facilities-ownership limitation they seek to impose. As the incumbents would have it, a facilities-ownership requirement must be read into § 251 (c)(3) because the absence of such a requirement "effectively nullifie[s]" the Act's resale provision (§ 251(c)(4)), in contravention of the canon of statutory construction that a statute should be interpreted so as to give meaning to all of its parts. BA 2. But for two reasons that canon of construction is inapplicable.

First, the FCC's reading of § 251(c)(3) will have the effect the incumbents claim only if the incumbents are correct in their self-serving predictions that resale will

always be more expensive and otherwise less desirable than combinations of network elements. In other words, the incumbents' nullification argument depends on a series of empirical assumptions about contingent possibilities. That is not, in any meaningful sense, an argument about the statutory text, but is, instead, an argument about the reasonableness of the factual findings and policy judgments the FCC made in concluding that its approach would not read resale out of the Act. As will be demonstrated, the incumbents have raised no meaningful challenge to those findings and judgments, and thus they must be affirmed as reasonable. *See infra* pp. 14-21.

Second, the incumbents' own arguments make clear that the FCC's reading does not nullify the Act's resale provision. The very point of their "regulatory arbitrage" argument is that new entrants will use resale to compete for customers whose rates are presently subsidized, *see* U S West 45 ("because competitors can obtain subsidized services at a discount from the below-cost rates incumbents must charge, competitors can resell them at comparably below-cost prices"), while relying on unbundled elements (which are priced at cost-based rates pursuant to § 252(d)(1)) to compete for classes of customers whose rates generate the subsidies. Thus, even if the incumbents' views are correct, resale will remain the preferred option for competing for some classes of customers. Whatever else might be said of such an argument, it does not involve the " 'emasculat[ion of] an entire section' of a statute." BA 60 (quoting *Bennett v. Spear*, 117 S. Ct. 1154, 1166 (1997)).

In sum, because the incumbents' construction of § 251 (c)(3) "is not an inevitable one," the FCC's contrary view must be upheld so long as it is reasonable. *Regions Hosp.*, 118 S. Ct. at 916-17. The FCC's interpretation easily passes muster under that deferential standard.

2. *The FCC's Decision Not to Impose a Facilities Ownership Limitation Was Not Arbitrary and Capricious Or Otherwise Unreasonable.*

The incumbents have not shown that the FCC acted in an arbitrary or unreasonable manner in rejecting their demand that only new entrants with their own facilities be permitted to lease unbundled facilities.

First, the key premise of the incumbents' argument—that resale will always be more expensive than relying exclusively on network elements—is wrong. In some states, the price of the "platform" of all of the elements combined together is lower than the resale price. But in others the resale price for new entrants is *less* than the cost of leasing only the wire loop and port on the switch connecting the home to the switch, without even considering the cost of switching and the other elements necessary to provide service.[5] Furthermore, much of the attractiveness of using elements today results from the fact that lessors can compete in the highly profitable market for exchange access—charging long-distance companies for the use of the local lines needed to begin and end long distance calls—while resellers cannot. But this is not a permanent state of affairs; competition will reduce the price of access. When that happens, different market conditions will prevail, and market participants will make new calculations about the relative merits of building, leasing elements, or reselling existing services.

Second, resale and relying exclusively on leased elements are not "functional equivalents." As the FCC

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[5] For example, the monthly resale price for providing residential service in Texas ranges from $6.39 to $8.66. *See Southwestern Bell Telephone Company Texas Local Exchange Tariff, 3.1.1 Residential Service*, at 3 (issued Jan. 27, 1995) (effective March 3, 1995); *Petition of MFS Communications*, Docket Nos. 16189 *et al.*, Arbitration Award, at 17-19 & Appendix B (Pub. Util. Comm'n Tex. Nov. 7, 1996). In contrast, the cost of leasing the loop and switch port alone is $17.05—almost double the highest resale rate. *Petition of MFS Communications*, Docket Nos. 16189 *et al.*, Arbitration Award, at Appendix B (Pub. Util. Comm'n Tex. Dec. 19, 1997).

found, resellers and lessors face entirely "different opportunities [and] risks." *Local Competition Order* ¶ 331, Pet. App. 244a. "[C]arriers reselling incumbent LEC services are limited to offering the same service an incumbent offers at retail." *Id.* ¶ 332, Pet. App. 244a. On the other hand,

> a carrier offering services solely by recombining unbundled elements can offer services that differ from those offered by an incumbent. For example . . . carriers using unbundled elements can bundle services that incumbent LECs sell as distinct tariff offerings, as well as services that incumbent LECs have the capability to offer, but do not, and can market them as a bundle with a single price. The ability to package and market services in ways that differ from the incumbent's existing service offerings increases the requesting carrier's ability to compete against the incumbent and is likely to benefit consumers. . . . These services, however, are not available for resale under section 251(c)(4) of the 1996 Act.

Id. ¶ 333, Pet. App. 244a-245a (footnotes omitted). Moreover, a competitor who leases the full "platform" of elements to provide service can combine the leased network in any way it sees fit, while the reseller can only use the network exactly as it is configured by the incumbent. Respondents contest none of this.

Indeed, the incumbents do not really argue that these two entry vehicles are the same. The essence of their position is that relying on leased elements is in every respect superior to resold service, and therefore to "preserve" resale, only competitors who already own some of their own facilities should be able to lease elements. *See, e.g.,* BA 62. In its order, however, the FCC concluded that resale did not need "protection," because although carriers "taking unbundled elements may have greater competitive opportunities than carriers offering services available for resale, they also face greater risks." *Local Competition Order* ¶ 334, Pet. App. 245a. As the FCC explained:

> A carrier purchasing unbundled elements must pay for the cost of that facility. . . . It thus faces the risk that end-user customers will not demand a sufficient number of services using that facility for the carrier to recoup its cost. (Many network elements can be used to provide a number of different services.) A carrier that resells an incumbent LEC's services does not face the same risk. This distinction in the risk borne by carriers entering local markets through resale as opposed to unbundled elements is likely to influence the entry strategies of various potential competitors.

Id.

The incumbents would have this Court reach precisely the opposite conclusion, on the theory that because all necessary elements can be leased on an "as needed" basis, lessors "need bear no risk of demand fluctuation." BA 62. But such a bold assertion, unsupported by any record evidence, provides no basis for overturning the FCC's contrary findings as arbitrary and capricious. Moreover, it is simply not the case that all elements may be leased on an as needed basis. The local loop, the "port" that connects the loop to the switch, and other elements are all priced at flat rates. Additionally, to compete in the market for exchange access, new entrants must lease facilities and develop billing and support systems the cost of which may or may not be recouped, depending on how much long distance service their customers use. In sum, just as the FCC determined, unlike a reseller, a lessor has no predictable margin, and faces the risk of unused capacity. For all of these reasons, competitors have chosen and will continue to choose to resell rather than to lease in a variety of market settings: for example, when the customer is receiving a subsidized rate, or when the competitor needs quick or easy entry into the market. The incumbents' argument to the contrary ignores the record and misstates the facts.

Third, the incumbents have nothing to say about the FCC's administrative and policy justifications for rejecting the facilities-ownership limitation on § 251(c)(3).

The FCC determined that such a limitation would be "administratively impossible" because "it would not be possible to identify the elements carriers must own without creating incentives to build inefficient network architectures that respond not to marketplace factors, but to regulation" and any such limitation "would likely be so easy to meet it would ultimately be meaningless." *Local Competition Order* ¶ 339, Pet. App. 248a. The FCC also concluded that such a restriction would artificially limit competition to those few markets that could "efficiently support duplication of some or all of the incumbent LEC's networks." *Id.* ¶ 340, Pet. App. 249a. Unable to respond to a single one of these conclusions, the incumbents instead berate the FCC for "seek[ing] shelter in policy arguments of [its] own." BA 63. That is, however, the FCC's job.

Fourth, and most importantly, it was eminently reasonable for the FCC to reject the incumbents' argument that the absence of a facilities-ownership restriction on § 251 (c)(3) will "subvert[] the important goal of preserving universal telephone service," BA 2, by subjecting the monopoly retail rates that allegedly fund such service to competitive pressures. The very point of the Act is to create local competition that will drive down those supracompetitive prices. As the incumbents themselves acknowledge, "[i]nterservice subsidy arrangements were economically sustainable only because the States preserved . . . legal barriers to entry." BA 4. Congress understood that the existing system of alleged implicit subsidies would not survive in a competitive market, and intended to replace it with a system of subsidies that "should be explicit, rather than implicit, as many support mechanisms are today." H.R. Conf. Rep. No. 104-458 at 131 (1996) ("Conf. Rep.").

The incumbents nevertheless insist that Congress intended this change to come gradually, so that states would have a "potentially lengthy period" of time, BA 50, in which to make the transition to a system of express "universal service" subsidies. In particular, they argue that

the current system of rate averaging should remain in place until full-fledged competing physical networks have emerged. From this they insist that it follows that the Act's leasing provision was designed to be an extremely limited transitional device, lest competition develop too quickly. Congress, the story goes, intended rapid competition to develop only through resale, a method that accordingly was designed to protect the current system.

But § 251(c)(3) is not a transitional measure—it imposes permanent obligations on the incumbents—and it contains no express or implied judgment that leasing is disfavored, or disfavored during some undefined interim period. Indeed, the FCC correctly found that Congress did not "express[] a preference for one particular entry strategy," but created alternative paths new entrants could employ "as market conditions and access to capital permit." *Local Competition Order* ¶ 12, Pet. App. 137a-138a. By requiring incumbents to facilitate all three types of competitive entry equally, Congress was drawing on past experience opening the long-distance market, where the Bell System's monopoly was broken up through a market-driven combination of resellers, lessors, and companies that built their own facilities. Congress was not attempting to micro-manage the development of local competition any more than regulators micro-managed the successful transition to long-distance competition.

Moreover, the incumbents' argument rests not on the statutory text, but on yet another assumption—namely, that Congress understood that facilities-based competition would take years to develop, and wanted no real competition in the interim. But the incumbents insistently told Congress that cable companies could provide meaningful facilities-based competition in the here and now. *See, e.g., Antitrust and Communications Reform Act of 1993 (Part 2) on H.R. 3626; Hearing Before the House Subcomm. on Economic and Commercial Law of the Comm. on the Judiciary*, 103d Cong. 154 (1994) (statement of Edward E. Whitacre, Jr., Chairman and CEO of Southwestern Bell Corp.) (noting "cable television companies

. . . already have or are entering the local telephone service market"); *see also* Conf. Rep. at 148 ("[M]eaningful facilities-based competition is possible, given that cable services are available to more than 95 percent of United States homes."). If Congress wanted to protect the current system of rate averaging and implicit subsidies, it therefore surely would have mandated full implementation of § 254's universal service reform requirements in *advance* of allowing competition by owners of competing networks.

The fact is that Congress took the opposite approach. It mandated that the local competition provisions of the Act be implemented as quickly as possible. *See* § 251 (d)(1) (FCC must issue implementing regulations within six months); § 252(b)(1) (new entrants may invoke arbitration within 160 days of seeking interconnection agreements); § 252(b)(4)(C) (state commissions must resolve arbitrations within nine months). At the same time, Congress provided that federal universal service reform would be accomplished on a less expedited basis, *see* § 254(a), while state reform could be completed as quickly as was necessary to offset the effects of emerging local competition, *see* § 254(f).

In this regard, it is telling that the state commissions have not joined the incumbents in their attacks on the FCC's unbundling rules. After all, the current system of rate averages and hidden subsidies is not the product of the incumbents' altruistic desire to ensure that everyone can afford phone service. The current system is the product of *state* policy choices. Had the FCC threatened those state policies in any meaningful way, the states would have objected. Their silence speaks volumes about the legitimacy of the incumbents' claims.

Nor did the FCC "ignore[]" the problems the state commissions would face as they were forced to address the realities of a competitive market. *Compare* GTE 52. To the contrary, the FCC enacted a series of protective measures to address the possibility "that the requirements

of the 1996 Act may be disruptive to existing state universal service support mechanisms during the period commencing with this order and continuing until we complete our universal service proceeding to implement section 254." *Local Competition Order* ¶ 715 (JA 155); *see also id.* ¶¶ 715-732 (JA 155-67) (establishing interim access charge regime to protect implicit universal service subsidies during transition to local competition). Respondents do not even acknowledge the FCC's reasoned response to the issues they have raised.

While the incumbents' principal policy argument is grounded in the premise that Congress did not intend facilities-based competition to develop too quickly, its second argument is, to the contrary, that Congress wished to encourage, not discourage, facilities-based competition, and that an unlimited right to lease is inconsistent with that legislative command. This argument suffers from the same defect as the argument that Congress favored resale over leasing. Nothing in the statutory text supports the incumbents' suggestion that Congress "carefully calibrated," BA 51, the three methods of competing service to assure that one was favored over another.[6]

Moreover, the FCC found it would serve no rational purpose for regulators artificially to encourage the building of facilities when market conditions otherwise would lead a competitor to lease them. *Local Competition Order* ¶ 340, Pet. App. 249a. No rational competitor would choose to rely on the incumbents' facilities as a long-term strategy, because it would require levels of cooperation that the incumbent would have no incentive to provide. Long-term reliance on unbundled elements would require a massive investment in monitoring, regulating, and litigation costs. For such reasons, MCI has already invested almost two billion dollars in constructing its own facilities.

Finally, the most sensible way to promote the construction of competing facilities is to encourage leasing. A competitor that leases all of the necessary elements from

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[6] *See supra* pp. 14-19.

the incumbent must first build the necessary operations support systems to order, repair, and bill for the leased elements,[7] and must decide which services to market. Then, as traffic volumes increase, or technological advancement makes building more economical than leasing, the competitor would find it relatively easy to substitute its own facilities for those it had previously leased from the incumbent. A reseller, on the other hand, is the furthest removed from a facilities-based provider, and would not develop systems or expertise that would be helpful if it subsequently chose to build its own facilities. It is leasing, not resale, that is the strategy of choice for competitors like MCI whose ultimate goal is to build their own facilities.

C. The Incumbents' Remaining Challenges to the FCC's Unbundling Requirements Are Without Merit.

The incumbents argue that the FCC exceeded Congress' plan in ordering the unbundling of such critical components of local service as operational support systems, directory assistance, operator service facilities, and vertical features. Once again, however, the incumbents have no argument that the plain text of the 1996 Act forecloses the FCC's unbundling rules. Their arguments rest instead on the most strained inferences from statutory text and proceed from the false premise that Congress wanted new entrants either to build their own facilities or to resell incumbent services rather than to rely on unbundled network elements. But Congress directly delegated to the FCC the task of prescribing nationwide rules for unbundling, including rules dictating what elements should be unbundled. Had Congress wanted to limit the FCC in the way the incumbents propose, it surely would have said so in a straightforward manner. It did not.

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[7] These operational support systems allow the competitor to connect directly to the incumbents' elements, including in particular to the incumbents' *own* operational support system. *See infra* pp. 23-25.

1. *The Eighth Circuit correctly upheld the FCC's reasonable interpretation of the Act's definition of network elements.*

A network element is

> a facility or equipment used in the *provision* of a telecommunications service. Such term also includes features, functions, and capabilities that are *provided* by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or *other provision* of a telecommunications service.

§ 153(29) (emphasis added). The incumbents argue that this text imposes a requirement that a network element must be "unalterably rooted in discrete physical parts" of the network and must be used to transmit or deliver calls. *See* GTE 54-55. The Eighth Circuit rejected that implausible reading of the Act. *See* Pet. App. 41a-43a.

The statutory text does not limit "network elements" to call routing facilities, because it encompasses all facilities used in the provision of service as well as all the features, functions, and capabilities of those facilities used "in the transmission, routing, or *other provision* of a telecommunications service." § 153(29) (emphasis added). The incumbents argue that under the principle of *ejusdem generis* the term "other provision" of service is limited only to alternate means—in addition to transmission and routing—of *physical* delivery of a call. *See, e.g.,* U S West 40. But Congress previously defined the concept of "provision" of service broadly to include the features, functions, and capabilities that are "provided by" means of a facility, and it explicitly listed "information sufficient for billing and collection" as an example of network elements so defined. § 153(29). Provision of these features—critical to telecommunications service—is not a means of physical delivery of a telephone call.

Because Congress defined the term "provision" so broadly in the first part of § 153(29), the canon of

ejusdem generis does not dictate that the terms "transmission" and "routing" necessarily modify the later use of the same term and restrict it to physical delivery of a call. *See* GTE 56; U S West 40. Had Congress meant to restrict the meaning of the term "provision" after initially defining it so broadly, it would have done so explicitly. Instead, Congress emphasized again that "provision" of a service includes more than transmission and routing: the language specifies "transmission, routing, or *other*" provision of service; in context it cannot be taken to mean "transmission, routing, or *similar*" provision of service. The FCC reasonably found that because " 'transmission' and 'routing' refer to physical delivery, the phrase 'or other provision of a telecommunications service' goes beyond mere physical delivery." *Local Competition Order* ¶ 261 (JA 40).

a. *The FCC reasonably found that the incumbents must provide access to their operational support systems.*

Operational support systems ("OSS") are "software systems and accompanying databases that are necessary to process orders, handle billing, and provide maintenance and repair capabilities to phone customers." Pet. App. 42a. They allow a telephone company to assign and track the specific facilities that serve individual customers, advise new customers of their telephone numbers, and schedule repair visits when customers report service troubles. The FCC concluded, and the Eighth Circuit agreed, that OSS and the information it contains "fall squarely within the definition of 'network element.' " *Local Competition Order* ¶ 516 (JA 116-17); Pet. App. 42a-43a. In so doing, the FCC reasoned that the text of the Act reflects Congress' recognition that new competitors cannot enter local markets successfully without access to OSS, and found that "[o]perational interfaces are essential to promote viable competitive entry." *Id.* (citation and internal quotations omitted).

The FCC further found that incumbents must lease their OSS functions to competitors pursuant to § 251(c)(3) for three independent reasons. First, OSS is a network element because the systems themselves are " 'databases' " or " 'facilit[ies] . . . used in the provision of a telecommunications service,' " and their functions are " 'features, functions, and capabilities that are provided by means of such facilit[ies].' " *Id.* ¶ 517 (JA 117) (quoting § 153(29)). Second, OSS is a network element because the information contained in and processed by the systems is "information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." *Id.* Third, even if OSS were not itself a network element, access to OSS is a "term and condition" of access to other network elements, and must, therefore, be provided on a nondiscriminatory basis pursuant to § 251(c)(3) and (c)(4). *Local Competition Order* ¶¶ 510, 518-519 (JA 114-16, 118-19). The incumbents do not even address this third and independent ground for the ordering of competitors' access to incumbents' OSS. This ground in itself provides an adequate basis for upholding the FCC's interpretation of the Act. In any event, the incumbents' argument that OSS does not fall within the statutory definition of network elements because it is not a physical part of the call-routing network fails: meeting that requirement is not necessary because the incumbents fabricated it. *See supra* pp. 22-23. The Act's definition *explicitly* encompasses OSS functions like "billing and collection," which are neither physical nor parts of the call-routing network.

Beyond this, the incumbents can only take issue with Congress' policy choices. They complain that allowing competitors access to their software would allow new entrants to run their business "just as efficiently as incumbents." GTE 59. But that is precisely what Congress hoped to accomplish when it included "databases" and "information" in the definition of network elements and directed nondiscriminatory access to those elements. *Local*

Competition Order ¶¶ 510, 518-519 (JA 114-16, 118-20). Incumbents' complaint is with the Act and not with the FCC.

b. ***The FCC reasonably found that directory assistance, operator service facilities, and vertical features are network elements.***

The Eighth Circuit's "agreement with the FCC's determination that the Act broadly defines the term 'network element' " properly led the court "also to agree with the Commission's conclusion that operator services, directory assistance, caller ID, call forwarding, and call waiting are network elements that are subject to unbundling." Pet. App. 44a. The court held that operator service facilities and directory assistance are "features, functions, or capabilities that are provided by facilities and equipment that are used in the provision of telecommunication services." *Id.* Operator service facilities include the physical equipment used to complete certain types of calls mechanically (such as calling card calls), frequently without any human intervention, as well as live operators who can, when needed, use the equipment to switch or complete calls. Contrary to the incumbents' rhetoric, it is *not* live operators that the FCC "deemed 'elements' of the network subject to unbundling." GTE 57. Rather, it is the "function" and "capability" provided by the operator services system that the FCC and the Eighth Circuit agreed fall within the Act's definition of network elements. It matters not that some human services may be involved. Human intervention is often required to deliver the features, functions, and capabilities of network equipment that are indisputably network elements.[8] For example, a switch may need to be reconfigured or to have routing information added to its database, and people perform these functions. Congress drew no line excluding the human support necessary to deliver the functions of a network element.

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[8] Indeed, labor costs are included in the pricing of most network elements. *See supra* n.4.

Incumbents also challenge the FCC's inclusion of the software features of the switch that the incumbents use to provide caller ID, call forwarding, and call waiting as network elements. *See Local Competition Order* ¶ 423 (JA 95). The Eighth Circuit properly deferred to the FCC's judgment that these so-called "vertical features" of switches are features and functions of the switch that are no different from any other "features, functions, and capabilities" of the switch which competitors therefore have the right to lease at cost-based rates. § 153(29); *see* Pet. App. 42a-43a, 47 C.F.R. §§ 51.307(c); 51.319(c)(i)(C); *Local Competition Order* ¶¶ 412-413, 423 (JA 86-88, 95). The FCC held that switching is a "network element" that includes all of the features, functions, and capabilities of the switch: both the basic software embedded in the switch needed to route any telephone call and the switching software that makes possible *added* services such as caller ID, call forwarding, and call waiting. Both the FCC and the Eighth Circuit found this result compelled by the plain meaning of the statutory text. *See* Pet. App. 43a.

In the incumbents' view, the Court of Appeals erred in refusing to consider the practical consequences of the FCC's approach. Those consequences, the incumbents argue, are that, by leasing, competitors will be able to offer their customers services like call forwarding at a lower retail price than the inflated prices the incumbents are currently offering. The incumbents insist that if competitors can compete effectively by offering such enhanced local telephone services at cost-based rates, competition will deny the monopolists the profits they claim to need to support implicit universal service subsidies. *See, e.g.*, GTE 52-53.

That policy rationale is insupportable. A competitor's ability to offer vertical features at a lower price than an incumbent's current price is precisely what Congress intended. For the reasons previously stated, *see supra* 17-20, the incumbents' arguments based on the need to preserve universal service are groundless.

Nor do respondents gain anything by calling certain pieces of the telephone network "services." The incumbents contend that all of these systems—operator service systems, directory assistance, and vertical features—are "services" rather than "facilities," and therefore do not qualify as network elements. But the FCC and the Eighth Circuit agree that simply because certain features or functions of equipment may also be characterized as services does not preclude their characterization as network elements. *Local Competition Order* ¶ 263 (JA 41); Pet. App. 42a, 44a-45a. Indeed, the incumbents assert a distinction without a difference: *all* services are comprised of collections of features, functions, or capabilities of network facilities or equipment. The Eighth Circuit held that vertical features "satisfy the definition of 'network element;' consequently they are subject to the unbundling requirements of subsection 251(c)(3)." Pet. App. 45a. It agreed with the FCC that the incumbents' arguments to the contrary "would allow the incumbent LECs to evade a substantial portion of their unbundling obligation." Pet. App. 44a-45a.

For example, switching and lines that run from the switch to the business location have all been or could easily be offered as "services" available to retail customers. If none of these elements could be considered "network elements," the statutory provisions that allow for competitive service through unbundled network elements would be a dead letter. Nothing in the Act says (or even suggests) that "services" and "elements" are mutually exclusive categories, and the FCC's interpretation of the term facilities is, as the Eighth Circuit held, consistent with the Act's purposes. It must, therefore, be sustained.

D. The Eighth Circuit Correctly Upheld the FCC's Reasonable Interpretation of the Act's Standards for Competitors' Access to the Incumbents' Network Elements.

The incumbents also take issue with the FCC's implementation of § 251(d)(2), arguing that the agency ne-

gated the Act's limitations on competitor access to incumbents' network elements. *See, e.g.*, GTE 49. Section 251(d)(2) provides that the FCC, in determining what network elements should be unbundled pursuant to § 251(c)(3), "shall consider" whether access to proprietary network elements is "necessary" and whether the failure to provide access to such network elements would "impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." § 251(d)(2).

The incumbents disagree with the FCC's refusal to include in the "necessary" and "impairment" analyses an inquiry into the availability of similar but not identical network elements from alternate sources, *i.e.*, those outside the incumbents' networks. The incumbents argue that this refusal discourages innovation, particularly as to proprietary elements, BA 67, and that it creates disincentives to facilities-based competition. They invoke the antitrust doctrine of essential facilities in proposing that the proper analysis should examine whether the competitor can reasonably or practically duplicate the relevant element, BA 66, or at the very least should examine the availability of existing alternatives outside the incumbent's network, GTE 62.[9]

The factors Congress enumerated, however, need only be "considered." Having done so, the FCC is free to reach a reasoned conclusion that the element must be provided even if not necessary and not impairing the competitors' service. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 95 (1995); *id.* at 103 (O'Connor, J., dissenting) (agreeing with majority that where Medicare Act provides that Health and Human Services "shall consider" generally accepted accounting principles in prescribing Medicare reimbursement standards, the Secretary retains "broad and

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[9] Of course, if the antitrust and the Act's standards were the same, there would be no need for the Act in this regard, because competitors would achieve no more and no less by invoking the Act rather than the antitrust laws.

flexible authority" and "is not bound" to adopt these specific principles). Thus, incumbents' argument that § 251 (d)(2) expressed a congressional policy of truncating the availability of network elements cannot stand scrutiny. Beyond that, the FCC had ample basis to reject the notion that incumbents need not provide proprietary elements if competitors can obtain similar elements from a source outside the incumbents' networks, *Local Competition Order* ¶ 283 (JA 51-52), and to reject the incumbents' position that competitors are not impaired in providing service if they can obtain similar elements from another source or can provide the proposed service through resale; *id.* ¶ 286 (JA 53-54).

The FCC could hardly have been on firmer ground in so rejecting the claim that "necessary" must mean "indispensable," an interpretation that this Court has rejected in a similar context as too rigid for a word that should "be harmonized with its context." *Armour & Co. v. Wantock*, 323 U.S. 126, 129-30 (1944); *see also M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819) ("necessary" means "convenient, or useful"). The court of appeals determined that the FCC's definition was "a reasonable one and entitled to deference," Pet. App. 49a, agreeing with the FCC that "[a]n overly strict reading of the word 'necessary,' as the petitioners propose, would unduly restrict the unbundling duty of incumbent LECs and hinder the development of competition in the local telecommunications industry." *Id.* By the same token, the court found the FCC's definition of "impair" to be consistent with dictionary definitions and consistent as well with the Act's pro-competitive purposes. It therefore concluded that the agency's definition was entitled to deference under *Chevron*. *Id.* at 50a.

As to both the "necessary" and "impairment" standards, the incumbents' "alternative sources" position would simply nullify the Act's unbundling requirements. Incumbents control almost all the network elements that currently exist. A competitor could, of course, in theory—

with enough capital and enough time—build a competing network and so provide itself with all these network elements from other sources. To say, as the incumbents do, that the analysis should at least examine existing alternatives outside the incumbents' network is to say nothing: "As a practical matter, if it is more efficient and less costly for new entrants to obtain network elements from a source other than an incumbent LEC, new entrants will likely pursue the more efficient and less costly approach." *Local Competition Order* ¶ 287 (JA 54-55); *see* Pet. App. 48a. But if (as is likely) because of economies of scale and scope, the incumbent monopolist is the most efficient source of a network element, the Act requires that those economies be shared with competitors. *See Local Competition Order* ¶ 10, Pet. App. 136a-137a. As the Eighth Circuit observed, Congress required that the monopolists' network elements be made available for lease precisely so that incumbents would have to share those economies with potential competitors, because of the extraordinary time and expense involved in constructing duplicate ubiquitous telephone networks. Pet. App. 48a.

Moreover, "requiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act." *Local Competition Order* ¶ 283 (JA 51-52). The incumbents accuse the FCC of denigrating and deliberately ignoring the Act's purpose of promoting—against other forms of entry—facilities-based competition by simply masking the concept of facilities-based competition in the pejorative term "unnecessary duplication." *See* U S West 32. But, in fact, the FCC reasonably understood that Congress could not have desired *unnecessary* duplication. Instead, competition is enhanced and consumers benefitted when the decision whether to build or to lease is dictated to the greatest extent possible by the market. Additionally, it is competition, and not just facilities-based competition, that is the primary and most urgent goal of the Act. *See*

supra 21-22. As the Eighth Circuit reasoned in determining that the FCC's alternate sources ruling was a reasonable one entitled to deference:

> Allowing incumbent LECs to evade their unbundling duties whenever a network element could be obtained elsewhere would eviscerate unbundled access as a means of entry and delay competition, because many network elements could theoretically be duplicated eventually. The Act, however, provides for unbundled access to incumbent LECs' network elements as a way to jumpstart competition in the local telecommunications industry.

Pet. App. 48a.

The FCC reasonably interpreted the Act's standards for access to network elements.

II. CONGRESS GRANTED THE FCC THE AUTHORITY TO IMPLEMENT THE LOCAL COMPETITION PROVISIONS OF THE 1996 ACT, INCLUDING THE PRICING PROVISIONS.

Congress, in the 1996 Act, unambiguously preempted state laws governing a host of local competition issues and enacted in their place a set of comprehensive federal standards. Despite this, in the name of federalism and purported loyalty to congressional intent, the Eighth Circuit denied the FCC the jurisdiction to implement many of those new federal provisions—including the pricing provisions—thus depriving the FCC of the authority to implement key provisions of federal communications law. In so doing, the Eighth Circuit ensured that, contrary to Congress' intent, the key federal provisions of the Act will be authoritatively interpreted not in an orderly, comprehensive fashion informed by the analysis of the federal agency entrusted to interpret communications law, but instead in a piecemeal fashion, over many years, by federal courts that lack any expertise in national communication policy. In part as a result of that decision, the prospects for the rapid opening of local markets have been destroyed. Neither the text of the 1996 Act, nor policy concerns, nor

any other provision of the Communications Act can justify that decision.

A. The Plain Text of the Statute Confirms That the FCC Has Authority to Implement the Local Competition Provisions of the Act, Including § 251's Rate Provisions.

The Eighth Circuit's decision to strip the FCC of rule-making authority over most of the local competition provisions—including the pricing provisions—depends on the false premise that nothing in the 1934 Act, or in the 1996 Act (which amended it), confers on the FCC plenary authority to implement the 1996 Act's local competition provisions. Respondents' arguments in support of this premise fail.

First, the argument flies in the face of the statutory text affirmatively granting the FCC rulemaking authority. Section 251(d)(1), which instructs the FCC to "establish regulations to implement the requirements of" § 251, is not merely a time constraint but an affirmative grant of authority. Indeed, the language of § 251(d)(1) is drawn from the virtually identical provision of the House Bill, *see* H. Rep. at 4 (§ 241(b)(4)), which clearly was intended as a grant of authority. *See* Conf. Rep. at 120 ("Section 241(b)(4) directs the Commission to establish regulations"); *see id.* at 121 (same). Moreover, in § 276(b) of the Act, Congress used virtually identical language that incumbents concede (BA 36) empowers the Commission to issue regulations to implement the Act's provisions on payphone services. *See, e.g., Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 861 (1986) ("identical words used in different parts of the same act are intended to have the same meaning") (citation omitted).

Section 201(b) also provides the FCC with a broad source of power. Respondents are left with the difficult prospect of arguing that § 201(b)—which authorizes the FCC to prescribe regulations "to carry out the provisions of the Act"—does not mean what it says. BA 43-44; GTE 33-34. They suggest that this clear grant of au-

thority should be limited by "context" to apply only to interstate communications. But Congress knew well the difference between a grant of authority that was section-specific, and a grant of authority that affected the entire Act. *Compare* § 317(e) ("The Commission shall prescribe appropriate rules and regulations to carry out the provisions *of this section*") (emphasis added), *with* § 201(b) ("Commission may prescribe rules and regulations . . . to carry out the provisions *of this Act*") (emphasis added).[10] Section 201(b) makes clear that Congress granted the FCC authority to prescribe regulations to carry out the provisions of the Act.[11]

Second, respondents have no cogent response to the point that their reading of § 251(d)(1) and § 201(b)

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[10] While § 201(b) grants the FCC regulatory authority to implement the provisions of the Communications Act, provisions such as § 276(b) and § 317(e) not only *grant* the FCC authority, they also *require* the exercise of that authority or add particular instructions regarding its exercise.

[11] Respondents rely on legislative history to suggest that the last sentence of § 201(b) applies only to that portion of § 201(b) that allowed radio companies to furnish reports of the location and positions of ships at sea to newspapers without charge. *See* NARUC 27. Respondents thus suggest that when Congress gave the FCC the power to implement the provisions of "this Act" it actually meant to give the FCC the power to implement the "last sentence of part (b) of this section of the Act." To state the argument is to refute it. Indeed, respondents misread the legislative history: Earlier in the bill that added the last two sentences of § 201(b), Congress used the same term—"this Act"—in a context that plainly refers to the Communications Act, making clear that Congress' use of the same term in the next sentence could not have been accidental. *See Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.,* 505 U.S. 214, 225 (1992) (a phrase "ought to be accorded a consistent meaning within the section"). Finally, in passing this provision, Congress *explicitly* noted that it was amending § 201(b) of the Communications Act, *see* Communications Act of 1934, amendment, Pub. L. No. 561, 52 Stat. 588 (1938); Congress thus had to know that giving the FCC the power "to carry out the provisions of this Act" would give the FCC the broad power to implement the Act that the new bill amended, *i.e.,* the Communications Act of 1934.

would leave the FCC without authority to implement many of the other provisions of § 251, which all agree it may implement. *See, e.g.*, Pet. App. 12a n.10. These other provisions are not, as respondents claim, specific grants of authority in themselves. Most of these sections *presume* FCC power to regulate; they do not grant it. *See, e.g.*, § 251(c)(4)(B) ("a State commission may, *consistent with regulations prescribed by the Commission under this section*, prohibit" certain actions) (emphasis added); § 251(g) (requiring local exchange carriers to continue to comply with preexisting equal access and nondiscriminatory interconnection restrictions and obligations "until such restrictions and obligations are explicitly superseded *by regulations prescribed by the Commission*") (emphasis added). The text of these provisions also answers respondents' rhetorical question: "if section 251(d)(1) *already* provided the FCC with generic authority over all of sections 251 and 252, why would Congress have included these specific delegations of authority to the FCC?" BA 39 (emphasis in original). These provisions do not delegate authority to the FCC; they limit FCC authority delegated elsewhere or define limits on the power of state commissions. *See, e.g.*, § 251(d)(2) (limiting FCC authority by describing standards that the FCC must consider in determining what elements are available for unbundling); § 251(c)(4)(B) (giving state commissions the power to prohibit certain actions by a reseller, but limiting that power by requiring that it be "consistent with regulations prescribed by the Commission under this section").

Third, § 252(c)(2)—which provides that "[i]n resolving . . . any open issues . . . a State commission shall . . . establish any rates for interconnection, services, or network elements"—cannot bear the weight respondents place on it. Respondents' reliance on § 252(c)(2) is linked to their argument that the FCC lacks plenary authority to implement §§ 251 and 252. They contend that § 252(c)(2) unambiguously grants state commissions the power to set rates and pricing methodologies, BA 20;

GTE 27-28, or, at the very least, § 252(c)(2) confirms Congress' understanding that the FCC lacks such authority, and that the state commissions possess it.

Nothing in § 252(c)(2) can plausibly be read to deprive the FCC of jurisdiction to implement any of the provisions of the 1996 Act. Section 252(c)(2) merely assumes that state commissions will at times set rates, and it imposes substantive limits on state commissions when they do. The provision is conditional: It provides that "[i]n resolving . . . any open issues . . . a State commission shall— establish any rates . . . according to subsection (d)." § 252(c)(2). In terms, it requires only that whatever issues remain open, the state commission will resolve consistent with the limitations provided in § 252(c). *See, e.g.*, § 252(c)(1) (state commissions' resolution of any open issues must comply with § 251 and FCC regulations thereunder); § 252(c)(2) (state commissions' resolution of any open pricing issues must meet additional requirement of § 252(d)(1)).

Respondents suggest that § 252(c)(2) deprives the FCC of jurisdiction because it directs state commissions engaged in setting rates "to apply *solely* the standards of § 252(d)," and not the standards contained in § 252 (c)(1), which incorporate by reference the FCC regulations promulgated under § 251. GTE 30 (emphasis added); *see also* BA 23. The word "solely," however, does not appear anywhere in § 252(c)(2), and with good reason. The restrictions on the state commissions' resolution of any open issues are conjunctive; thus § 252 (c)(2) places an *additional* restriction on the state commissions' determinations of open issues concerning price: those determinations must comply with the requirements of § 252(d). The *additional* requirement imposed by § 252(c)(2), however, does not eliminate the other requirements imposed by § 252(c) with respect to "*any* open issues," a term which by its plain language includes price issues. In particular, § 252(c)(2)'s additional requirement governing pricing obligations cannot insulate such determinations from § 252(c)(1)'s directive to apply

"the regulations prescribed by the [Federal Communications] Commission pursuant to section 251." [12]

Moreover, the fact that § 252(c)(2) reflects Congress' assumption that state commissions would at times set rates does not deprive the FCC of jurisdiction over pricing methodology. Just as state commissions can resolve other "open issues" consistent with binding FCC regulations pursuant to § 252(c)(1), state commissions can "establish rates" pursuant to § 252(c)(2) by taking binding FCC regulations that prescribe a pricing methodology and applying them in concrete fact situations in a way that takes account of local conditions. *See also Local Competition Order* ¶¶ 135-137, Pet. App. 223a-224a.[13]

Fourth, the legislative history—and in particular the decision of the conference committee to split § 251 from § 252—does not help respondents. BA 24-25; GTE 29-31. The conference committee's decision to make §§ 251 and 252 separate provisions was not an effort to withdraw the FCC's authority over price and give it to the state commissions. Section 251 sets forth substantive standards for rates just as much as § 252 does. *See, e.g.,* § 251 (c)(2)(D); § 251(c)(3); § 251(c)(4)(A). Moreover, Congress itself entitled § 252 "*Procedures* For Negotiation,

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[12] For this reason, there is no merit to respondents' suggestion that petitioners' reading of the statute renders § 252(c)(2) "wholly superfluous." BA 24; GTE 29. Section 252(c)(2) imposes an additional requirement on state commissions when they resolve open rate issues that does not exist when state commissions resolve other open issues, thus making explicit that state commissions must comply with *both* the FCC's regulations *and* the requirements of § 252(d), including in particular § 252(d)(1)'s prohibition on using rate of return or other rate based methods.

[13] Respondents argue that § 252(c)(2) trumps § 251(d)(1) and § 201(b) because the specific controls the general. *See* BA 34; GTE 34. But that argument simply assumes its conclusion, *i.e.*, that there is a conflict between the two provisions that must be resolved. As noted above, however, there is no conflict (and thus no need to resolve the tension between a specific provision and a general one) because the provisions can, and therefore must, be read harmoniously.

Arbitration, and Approval of Agreements" (emphasis added). *See, e.g., INS v. National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) (title of section can aid in resolving meaning of the statutory text). Given that Congress itself indicated that the separation of § 251 from § 252 was intended to embody a separation of the substance of the interconnection agreements from the procedures for negotiating and approving them, there is no reason to believe that Congress' decision to separate §§ 251 and 252 was at all intended to foreclose FCC regulation of prices.

Respondents' arguments are not bolstered by their reliance on unsupported and self-serving assertions that their allies successfully lobbied the conference committee to make these changes in order to protect state authority. *See* BA 25 n.13; GTE 30 & nn.15-16. These arguments —which ask this Court to interpret a statute based on the unsupported assertions of private parties that they successfully lobbied Congress—are not "legislative" history at all. *See Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986) (declining to "accord any significance" to statements because "none of those statements was made by a Member of Congress, nor were they included in the official Senate and House Reports").

In any event, respondents' cavalier approach to legislative history ignores the conference committee's own assertion that it noted changes "except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes." "Conforming" changes are those changes required as a result of other, explained agreements of the conference committee. The changes respondents claim were made in conference would have been radical, substantive changes, unrelated to any explained agreement of the committee, and thus cannot possibly be considered "minor" or "clerical" or "conforming" changes.[14] *See Central States Motor*

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[14] Both the House bill and the Senate bill gave the FCC the regulatory authority over pricing the respondents claim the confer-

Freight Bureau, Inc. v. Interstate Commerce Comm'n, 942 F.2d 1099, 1107 (D.C. Cir. 1991) (R.B. Ginsburg, J.).

Fifth, respondents can reconcile their reading of the statute with the plain language of other provisions of the Act such as §§ 271 and 160 only by ignoring the terms of those provisions or reading in limitations that Congress did not include. *See* MCI Opening Brief at 36-38. For example, they suggest that in passing on an application to enter the long distance market pursuant to § 271, the FCC "can require no more than interconnection in accordance with the pricing principle promulgated *by the States*." BA 42 (emphasis in original). But that is not what § 271 says. Section 271(c)(2)(B) requires the FCC independently to determine whether the § 271 applicant has provided "[i]nterconnection in accordance with the requirements of Sections 251(c)(2) and 252(d)(1)." *See SBC Communications, Inc. v. FCC*, 138 F.3d 410, 416-17 (D.C. Cir. 1998). Section 251(c)(2) includes the requirement that rates be "just, reasonable, and nondiscriminatory." No fair reading of § 271 permits the conclusion that Congress gave state commissions the license to determine the future of the nation's long-distance telecommunications markets.[15]

Similarly, respondents' arguments that the FCC's forbearance authority is limited to "certain aspects" of § 251 (c)—excluding price—ignores the fact that § 160 not only contains no such limitation, but in fact *requires* the FCC to consider whether charges are just and reasonable before the FCC may exercise that authority.

In sum, respondents' arguments cannot obscure what Congress has made clear: the FCC has authority to imple-

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ence committee stripped away without comment. *See* MCI Opening Brief at 32.

[15] Respondents make no effort even to try to defend the procedural and jurisdictional chaos with respect to § 271 applications that would result from their reading of the Act, *see* MCI Opening Brief at 37, nor to explain why Congress would have created such a bizarre scheme.

ment the local competition provisions of the Act, including the provisions concerning rates.

B. Respondents' Contention That the 1996 Act Created a "Decentralized State-centered Scheme" Is Untenable.

Unable to make a case on the basis of statutory text, respondents once again resort to policy and rhetoric to justify limiting the FCC's authority to implement the substantive requirements of federal law. Respondents contend that Congress wanted a "decentralized, State-centered" approach, BA 44, that was "deregulatory," and advanced values of federalism. But it is simply not true that the 1996 Act sought to divest the federal government of powers that were transferred to the state commissions. To the contrary, the Act took back from the state commissions much of the substantive authority they had over intrastate matters under the 1934 Act. Indeed, respondents' arguments trivialize the revolutionary aspect of the 1996 Act. For the first time, Congress applied a comprehensive set of *federal* standards to govern entry into local markets. The 1996 Act is "State-centered" principally in the sense that the state commissions have been enlisted as partners in the administration of *federal* law embodied in the new national policy. It is manifestly *not* "State-centered" in the sense that state commissions decide all of the key substantive policy issues by themselves. That much is confirmed not only by the sweeping preemptive federal directives governing local competition, but also by Congress' choice of exclusive federal district court review of state actions applying the 1996 Act. *See Matsushita Elec. Indus. Co. v. Epstein,* 516 U.S. 367, 383 (1996) (one principal purpose underlying a grant of exclusive jurisdiction is "to achieve greater uniformity of construction") (internal quotation omitted).

The incumbents deride this argument as "audacious," BA 44, but the audacity is theirs. Here, they argue that the 1996 Act contemplated "differing discretionary judg-

ments" and "State autonomy and discretion." BA 45; *see also* GTE 40. But in federal courts in § 252(e)(6) proceedings, they conveniently advocate the opposite. Thus, for example, respondent U S West has argued that federal courts should apply a *de novo* standard of review and accord no deference to state commissions' determinations, because had Congress "intended that any deference be accorded the state commissions, it would not have precluded review in the state court systems, where deference to State commissions is routinely accorded." [16] Similarly, respondents have argued that "unlike a uniform application by a federal agency, a federal statute could be subject to 50 different interpretations in 50 different states. Under these circumstances, deference to a State agency's interpretation of federal law is not appropriate." [17] *See also GTE South Inc. v. Morrison*, Civ. Act. No. 3:97-CV-493, GTE's Brief in Opposition to the Commissioners' Motion for Partial Summary Judgment, at 7-8 (E.D. Va. filed Dec. 1, 1997) (deference to state agency is inappropriate because "giving deference to state agency interpretations of federal law would result in multiple, inconsistent legal interpretations of the federal statute around the country" and because "state agencies lack the expertise in implementing federal laws and the nationwide perspective characteristically possessed by a federal agency").[18]

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[16] *U S West Communications, Inc. v. MFS Intelenet, Inc.*, No. 98-35146, Brief of Appellant, at 11 (9th Cir. filed June 11, 1998).

[17] *Southwestern Bell Telephone Co. v. AT&T Communications of the Southwest, Inc.*, Civ. Act. No. A-97-CA-132-SS, Motion for Summary Judgment of Southwestern Bell Telephone Company Based On Violations Of Statutory Standards and Supporting Brief, at 16 (W.D. Tex. filed Apr. 30, 1997).

[18] State commissions have unsuccessfully argued in § 252(e)(6) proceedings that a federal court should defer to decisions of state commissions on the meaning of federal law. Although this position avoids the brazen hypocrisy of the incumbents, it is simply wrong: federal courts do not defer to state agencies on questions of federal law. *See, e.g., AMISUB (PSL), Inc. v. Colorado Dep't of Soc. Servs.*, 879 F.2d 789, 795-96 (10th Cir. 1989); *Perry v. Dowling*, 95 F.3d 231, 236 (2d Cir. 1996). Unsurprisingly, the district courts have

Ultimately, incumbents are forced to concede that the 1996 Act adopted a "centralized" approach by providing for "ultimate federal oversight of State arbitrations," but they claim that Congress "chose a judicial, not an administrative, mechanism for this oversight." BA 5. Under incumbents' approach, the federal courts, on *de novo* review of state arbitration decisions, will decide the substance of the 1996 Act's federal requirements in a piecemeal fashion, over an extended period of time, and without the benefit of the views of the expert federal agency. But respondents offer no explanation why Congress would have wanted the federal courts and not the FCC to set national communications policy within the broad statutory framework. Moreover, as noted above, respondents' view that the Act contemplates a gradual unfolding of its key provisions is contrary to the numerous provisions of the Act that emphasize the need for rapid implementation, *see supra* p. 19, and would destroy the prospects for rapid competition in local markets, *see Local Competition Order* ¶ 618 (JA 131) ("such a process could delay competition for years"); *id.* ¶ 114, Pet. App. 212a ("Lack of national rules could . . . create great uncertainty for the industry, capital markets, regulators, and courts as to what pricing policies would be pursued by each of the individual states, frustrating the potential entrants' ability to raise capital.").

Respondents' invocation of "federalism" is similarly unavailing. BA 44-45, GTE 40-41. To be sure, the 1996 Act preserves a role for the state commissions if they choose

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uniformly refused to defer to the state commissions on the interpretation of the 1996 Act. *See, e.g., U S West Communications, Inc. v. Hix*, Civ. Act. No. 97-D-152, Memorandum Opinion and Order, at 9 (D. Colo. Dec. 5, 1997) (*Chevron* deference is inappropriate because state commissions "have little or no experience in implementing federal laws and policies and do not have the nationwide perspective characteristic of a federal agency."); *MCI Telecommunications Co. v. Bell Atlantic-Virginia Inc.*, Civ. Act. No. 3:97-CV-629, Order Ruling on the Commissioners' Motion for Partial Summary Judgment, at 3 (E.D. Va. filed Dec. 24, 1997) (no deference to state agency).

to accept it, but it is not a "State-centered scheme" that permits state commissions to act under state law with only limited federal constraints. Instead, the Act imposes federal standards interpreted at a general level by the expert federal agency, with state commissions having autonomy to apply these federal regulations to local conditions. This is not "patronizing rhetoric," GTE 38, and does not reduce the state commissions to the "ministerial" and discretionless task of implementing the FCC's methodology. *See* BA 7. To the contrary, as the FCC found, "state commissions will make critical decisions concerning a host of issues involving rates," *Local Competition Order* ¶ 137, Pet. App. 224a, including decisions about the prime components of rates, such as depreciation, joint and common costs, and profit. *See id.* ¶¶ 686, 696, 702 (JA 140-41, 143-44, 146-47). *See generally Louisiana Pub. Serv. Comm'n*, 476 U.S. at 364-65 ("depreciation practices contribute importantly to the calculation of both the carrier's investment and its expenses"). Regulations that promulgate broad ratemaking methodologies but leave open for state commission determination most of the critical inputs that go into a rate cannot be said impermissibly to establish the rate, to relegate state commissions to performing "ministerial" functions, or to deprive state commissions of their considerable discretion in carrying out federal law.

In a similar vein, respondents mistakenly trumpet the statement in the Conference Report that the 1996 Act produced a "pro-competitive, de-regulatory national policy framework." BA 4; *see also* GTE 11. The issue is not *whether* the Act will be interpreted and applied by regulators, but rather *which* regulatory agency (or agencies) will perform this task. Respondents never explain why "deregulation" counsels in favor of vesting rulemaking authority in 50 different state commissions rather than in the FCC. For national competitors such as MCI, respondents' interpretation of the Act—which subjects competitors to 50 different sets of regulations—is anything but "deregulatory." Moreover, the "deregulatory" nature of the 1996 Act surely stems in large part from its elimination

of anticompetitive *state* regulations which previously governed intrastate telephone markets. The Act's "deregulatory" nature thus cannot support the view that Congress intended for state commissions rather than the FCC to implement the Act's new federal standards.

In sum, respondents' State-centered vision of the Act is not only inconsistent with the vision of the Act they have put forth in § 252(e)(6) proceedings around the country, it is at odds with the language and purpose of the statute, ignores the extension of *federal* law to intrastate matters, and results in an irrational and unworkable scheme for local competition.

C. Section 2(b) Does Not Deprive the FCC of Jurisdiction to Implement the Federal Standards That Govern Rates.

In the 1996 Act, Congress took the extraordinary step of subjecting intrastate telephone markets to federal substantive law for the first time and (in § 253) gave the FCC unambiguous authority to preempt "*any* statute, regulation, or legal requirement" imposed by a State that "prohibits or has the effect of prohibiting" an entity from providing intrastate or interstate telephone service. In this context, it would be illogical to conclude that Congress nonetheless intended that state commissions—whose enabling acts, rules, and regulations were the very ones superseded by 1996 Act—have the *sole* authority to implement the key pricing provisions of the 1996 Act. *Cf. United Savs. Ass'n of Tex. v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law"). Nothing in § 2(b) requires this illogical result. First, even under respondents' mistaken understanding of § 2(b), § 2(b) erects no barrier to the FCC's implementation of the local competition provisions of the Act. Just as Congress provided in a straightforward and unambiguous manner for

the federal local competition provisions—including the pricing provisions—to *apply* to intrastate telephone services, Congress provided in a straightforward and unambiguous manner to *give the FCC jurisdiction* over those same services. Second, as MCI demonstrated in its opening briefs, § 2(b) was intended to limit only the FCC's *ancillary* jurisdiction over intrastate matters not governed by substantive federal law and has no application when, as here, federal law clearly applies to those matters.

As described above, *see supra* p. 34, in §§ 251(d)(1) and 201(b), Congress unambiguously gave the FCC authority to implement the local competition provisions of the 1996 Act. Respondents contend nonetheless that Congress' expression of its intent is insufficiently clear to satisfy § 2(b), on the theory that § 2(b) "precludes the FCC's assertion and exercise of authority over intrastate pricing and related matters without an *express* grant of jurisdiction over such matters." CA 33 (emphasis in original).[19]

That cannot be correct. The statement of congressional intent necessary to overcome § 2(b)'s presumption that the Communications Act does not "apply" to intrastate matters is the same as that necessary to overcome § 2(b)'s presumption that the Act does not "give the Commission jurisdiction" to regulate intrastate matters. Thus, if respondents are correct about what is necessary to overcome the § 2(b) presumption, then virtually *none* of the obligations in § 251 would even *apply* to intrastate communications. For virtually none of § 251's local competition provisions explicitly mentions intrastate matters or otherwise demonstrates the kind of "comparable language" that respondents assert is required. Respondents' § 2(b) argument would thus render the 1996 Act a nullity.

Uncomfortable with the implications of their argument, respondents simply ignore them, and blithely assert that

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[19] *See also* NARUC 33 ("The absence of an *explicit* grant of federal authority in sections 251 and 252 is fatal to the FCC's jurisdictional claim") (emphasis added)); BA 36; GTE 44.

Congress unambiguously intended for the pricing provisions of the Act to apply to intrastate matters but deny that Congress made sufficiently clear its intent that the FCC implement those provisions. But they cannot ignore that the applicability of § 251 to intrastate matters is just as "implicit" as—and is no more unambiguous than—the authority of the FCC to implement that section. Just as § 251(c) sets forth substantive federal requirements that all agree apply to intrastate matters, *see, e.g.*, GTE 11; *Local Competition Order* ¶ 71, Pet. App. 179a-180a ("None of the commenters appears to claim that section 251 addresses exclusively interstate matters"), § 251(d)(1) gives the FCC authority to implement those requirements.[20]

Moreover, this examination into whether Congress indicated its intent with sufficient clarity is unnecessary because § 2(b) limits only the FCC's *ancillary* jurisdiction. Thus, § 2(b) precludes the FCC from exercising jurisdiction over matters to which federal law does not unambiguously apply, *i.e.*, the sort of jurisdiction approved by this Court in *Shreveport*. Respondents' arguments to the contrary are unpersuasive. For example, respondents accuse petitioners of ignoring the term "or" and eliminating the second clause of § 2(b). BA 29; GTE 45. But this is simply incorrect. Petitioners merely disagree with respondents about the meaning of the second clause. As MCI indicated in its opening brief, the second clause of § 2(b) was intended to preclude the FCC from exer-

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[20] Respondents also argue that § 251(d)(1) cannot grant the FCC jurisdiction to implement the pricing provisions because, in contrast to § 276 of the Act, which explicitly refers to "intrastate and interstate" calls, § 251(d)(1) makes no mention of intrastate matters. BA 36; GTE 44. In § 276, however, had Congress omitted the term "intrastate," it would have been unclear whether the payphone provisions applied at all to intrastate matters. With respect to the local competition provisions, all concede that the relevant provisions of the Act clearly apply to intrastate matters, so the added specificity that was critical in § 276 to ensure that the substantive provisions applied intrastate would have been completely redundant.

cising ancillary jurisdiction; there is simply no indication that the clause was intended to perform the quite different function of severing the jurisdiction of the FCC from the substantive reach of federal law.

Respondents' treatment of the interaction of § 2(b) with § 201(b) only highlights their insupportable approach to statutory interpretation. They argue that the plain language of § 201(b) cannot mean what it says because it is limited by "context," and that, even if it does, it is trumped by § 2(b). But respondents' approach, in addition to doing violence to the plain language of § 201(b), relies on an inconsistent approach to context, using it to limit the plain meaning of § 201(b) but ignoring it when deciding the meaning of § 2(b). Respondents are forced into this inconsistency because, under their erroneous understanding of § 2(b), the provisions are in irreconcilable conflict. But as MCI showed in its opening brief, that conflict is purely one of respondents' own creation. In fact, the provisions are complementary: § 201(b) gives the FCC authority over interstate and intrastate matters to the extent that federal law applies to those matters, and § 2(b)—which limits the FCC's ancillary jurisdiction—provides that the FCC may go no further. *See Louisiana Pub. Serv. Comm'n*, 476 U.S. at 370 ("where possible, provisions of a statute should be read so as not to create a conflict").

Similarly meritless is respondents' assertion that *Louisiana* resolved the question now before this Court. In *Louisiana,* the Court resolved two separate issues; first, whether § 220 of the Act, establishing a uniform system of accounts, itself preempted state law, and second, if it did not, whether the FCC nevertheless could exercise *ancillary* jurisdiction—*i.e.*, jurisdiction over matters to which the Act did not directly apply—to preempt state law concerning depreciation. In the instant case, however, the contested division of authority between the FCC and the state commissions has nothing to do with preemption because Congress has already made the decision to preempt state law. Whatever entity regulates will indis-

putably be implementing new provisions of *federal* law that now govern local (*i.e.*, intrastate) telephone markets. Nothing in the holding of *Louisiana* suggests that § 2(b) was intended to deny the FCC jurisdiction even when federal law clearly applies and preempts state law.

Respondents nevertheless suggest that the ancillary jurisdiction argument is untenable because the *Louisiana* Court rejected the argument that § 2(b) was intended solely to prevent application of the *Shreveport* doctrine. *See* BA 30; GTE 46. But the *Louisiana* Court rejected an entirely different argument based on *Shreveport*. Respondents there argued that because *Shreveport* applied only to "rates," § 2(b) also applied only to rates and not to the other intrastate matters such as depreciation. Thus, the Court noted that it was "certainly true" that § 2(b) was intended to prevent "excessive federal regulation of intrastate service such as was sanctioned by the *Shreveport Rate Case*," but found "no authority in the legislative history to support respondents' proposition that the sole concern of the state commissioners was with 'protection against federal preemption of the states' setting of *individual customer charges* for specific intrastate services.'" 476 U.S. at 372 (citation omitted) (emphasis added). The *Louisiana* decision thus was not a rejection of the contention that § 2(b) was intended to overturn the *Shreveport* ancillary jurisdiction principle, but rather was a rejection of respondents' overly restrictive characterization of what that principle was.

Finally, there is no merit to respondents' argument that the legislative history of the 1996 Act is inconsistent with petitioners' approach. GTE 42-43; BA 27-28. Respondents view the conference committee's decision not to amend § 2(b) as working a major substantive change, even though that change appeared nowhere in the conference report. As noted above, that inference is flatly inconsistent with the conference committee's own description of its actions. *See supra* pp. 37-38. Respondents' reading of the conference committee's actions is particularly inappropriate when there is a ready explanation for those

actions: because an amendment to § 2(b) would be redundant with respect to the FCC's authority over the substantive provisions of the 1996 Act, amending § 2(b) could be seen as giving the FCC the license to exercise precisely the sort of ancillary jurisdiction the 1934 Congress had intended to prevent—for example, jurisdiction over local *retail* rates and depreciation, which remain regulated by state law. In any event, given the uninterrupted congressional practice of the last century and given Congress' decision to displace state laws governing competition in local markets, something more than silence is required to justify the conclusion that Congress intended to sever the FCC's authority to regulate from the reach of federal communications law.[21]

[21] California and NARUC suggest that the legislative silence supports their argument because § 2(b) has a 60-year history as a "universally understood reservation of State authority." CA 32; NARUC 36-37. But so far as petitioner is aware, § 2(b) has *never* been relied upon to deny the FCC jurisdiction to implement a federal provision that clearly applied to intrastate matters. Indeed, the state respondents' argument on this point serves only to underscore their inability to come to grips with the revolutionary aspect of the 1996 Act: Congress' decision to apply for the first time substantive *federal* law to intrastate matters.

CONCLUSION

The Eighth Circuit's decisions invalidating Rule 315(b) and stripping the FCC of plenary authority to implement the requirements of § 251 of the 1996 Act should be reversed, and its decision upholding the FCC's remaining unbundling rules should be affirmed.

Respectfully submitted,

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